REASONS WHY WRIT SHOULD BE GRANTED

I.—(Restated)

The Circuit Court erred in holding the indictment sufficient.

(1) The indictment was drawn under 18 U. S. C. 111 and stated that the two named person assaulted were "border patrol inspectors" as designated by Section 1114 of said Title 18. A border patrol inspector is not a person designated in Section 1114, as said section, in referring to immigration personnel, merely says "immigration officer". To hold that the indictment is sufficient in this regard, one must assume that a United States Border Patrol Inspector is (a) in the immigration service, and (b) an officer of such service.

A motion to quash the indictment for this reason was duly filed (R. 3) and by the Court overruled (R. 5).

(2) It is likewise thought that the indictment is hopelessly defective because

(a) it did not allege that the defendant "knowingly assaulted * * * an officer.";

(b) did not state that he feloniously or illegally (or some other word of like import) did the act;

(c) did not state that he intentionally or wilfully (or some other word of like import) did the act;

(d) did not state that defendant "knew" that the person assaulted was such federal officer;

(e) did not state that he knew he was "in performance of his official duties".

This Court has many times held that scienter and wilfullness must in some way be alleged in the indictment when

criminal intent is not necessarily involved, and wilfullness is not necessarily assumed. The Circuit Court affirmed almost entirely on the strength of *McNabb v. United States, 123 Fed. 2d 848, cert. den. 316 U. S. 658, rev. on other grounds 318 U. S. 332, rehearing den. 319 U. S. 784.* The Circuit Court in the *McNabb* case, p. 855 makes it clear that the indictment was upheld in that case because the killing was necessarily illegal. It says "unlawfully kill." Assault is not thought to be necessarily illegal because many assaults are justifiable. Under *18 U. S. C. Sec. 113*, different assaults are denounced and it will be noted that under Note 14 thereof, cases are cited under the heading "Justification". An assault may be committed in self defense, in defense of another, or in defense of one's property, and be perfectly legal. One may be legally assaulted when making an illegal arrest. *United States v. Angelet (C.A. N.Y. 1956), 213 Fed. 2d 190, cert. den. 76 S. Ct. 849.*

This Honorable Court in *Pettibone v. United States, 148 U. S. 197, 13 S. Ct. 542, 37 L. Ed. 419*, said:

> "It seems clear that an indictment against a person corruptly or by threats or force endeavoring to influence, intimidate or impede a witness or officer in a Court of the United States, in the discharge of his duty, must charge knowledge or notice, or set out facts that show knowledge or notice, on the part of the accused that the witness or officer was such; and the reason is not less strong for holding that a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court."

The *McNabb* opinion does not have the sanction of this Honorable Court and is in conflict with the *Pettibone* holding.

Wilfullness

The Fifth Circuit, the same one that affirmed this case, said in *Zebouni v. United States, 226 Fed. 2d 826:*

> "Certainly the mere omission of the word 'wilfully' from the statute is not to be construed as eliminating the element of criminal intent from the crime. Cf. Morisette v. United States, 342 U. S. 246; 72 S. Ct. 240, 90 L. Ed. 288."

See also, *Ingram v. United States, 1959, 360 U. S. 672, 3 L. Ed. 2d 1503, 79 S. Ct. 1314.* This Honorable Court, in *United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135,* in an often cited opinion, says in part:

> "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute unless those words of themselves fully and directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the Court to infer the intention of the legislature, does not dispense with the necessity of alleging in the indictment all of the facts necessary to bring the case within that intent."

Justice Field, in *Evans v. United States, 153 U. S. 584, 38 L. Ed. 830, 14 S. Ct. 934,* makes this very pertinent and hornbook observation:

> "There is a very general test applicable to all indictments. If the facts alleged be established or admitted to be true, and their truth is consistent with the

> defendant's innocence, the indictment is insufficient, however full the description in other respects."

It is thought that the omission of all words expressing "scienter" or "wilfullness" renders this indictment hopelessly defective under these authorities and many others. Everything in the indictment could be accepted as true and yet applicant not have committed any crime because he might have done so accidentally or under a mistake of fact or in some other legal manner. If it is thought that "forcibly assault" imports illegality, which does not seem to be true on account of the fact that many assaults are legal, yet such an assumption cannot possibly be applied to the other terms in the indictment, such as "resist, oppose, impede, intimidate and interfere with".

This Honorable Court held in *Yates v. United States, 354 U. S. 298, 1 L. Ed. 2d 1356, 77 S. Ct. 1064,*

> "In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground but not on another, and it is impossible to tell which ground the jury selected."

citing other Supreme Court cases. The *McNabb* case, relied on largely by the Circuit Court does not touch upon the requirement of wilfullness or "knowingly" doing the act. Besides the cases cited above requiring such allegations, see *Babb v. United States, 218 Fed. 2d 538,* and *Robinson v. United States (C. A. 10, 1959), 263 Fed. 2d 911:*

It seems that the omission of all such allegations from this indictment certainly renders it insufficient. Surely an indictment that the defendant "resisted, opposed, impeded, in-

timidated and interfered with * * *" would be insufficient for not alleging that he wilfully, knowingly or illegally did same.

II.—(Restated)

The Circuit Court erred in approving certain instructions of the trial court.

This point concerns two instructions given the jury from the bench by the trial court:

(a), in instructing the jury as to his manner and custom of sentencing aliens for illegal entry. This point is bottomed on the instruction of the Court to the jury during the trial of the case (R. 288). It will be observed that counsel for the defendant was trying to impeach or at least discredit the testimony of an alien government witness by showing that the immigration authorities had persuaded him to give testimony in favor of their position by offering him lucrative work in the United States and by threatening to send him to prison in the event he testified favorably to the defendant. The witness had testified that they had promised him he could go home (Mexico) when he "got through testifying for the government" (R. 257, 266). While counsel for the Government and counsel for the defendant were discussing the propriety of this line of testimony, the Court, instead of ruling on the objection made concerning such testimony, told the jury what his custom was concerning sentencing of wetbacks generally, and told them if one did not have a previous criminal record, he (the judge) "invariably orders him deported". The Court thereby, without any testimony supporting same, instructed the jury as to a factual situation and in effect testified from the bench

as to what his custom was, etc., thereby depriving defendant of any advantage that he had gained; or that he might gain by further examination. We consider that the instruction of the Court was improper and was not based on any evidence in the record, and was prejudicial;

(b) in instructing the jury as to the propriety and custom of the Government in holding aliens in this country until they are used as witnesses. Without cause or provocation, and we think without justification, the Court told the jury that it was the custom of the Government to detain alien witnesses in a manner such as they had been detained in this case, and in effect told them that such a custom was proper, ending with "it has been done over the years" (R. 289).

Quercia v. United States, 289 U. S. 466, 77 L. Ed. 1321, 53 S. Ct. 698, headnote 4, which in part is as follows:

> "* * * in commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it."

Headnote 5 of this case likewise emphasizes the necessity that the Judge in his comments must not show that he leans toward the side of the prosecution.

The record in this case shows that every alien witness that might give testimony in favor of petitioner herein, was held by the immigration authorities incommunicado under luxuriant arrangements and brought into court and testified at the main trial that the defendant shot first—the crux of the case. As soon as the trial was over they were

deported to Mexico and not allowed to come back under any circumstances. When defendant's attorneys produced affidavits signed by these witnesses in favor of applicant—that the officers shot first (R. 678), these witnesses were immediately persuaded to come back to this country under these lucrative arrangements and given sixty day renewable permits to work in this country, which they could not have gotten without giving testimony favorable to the Immigration Service's position (R. 679).

If it is a custom of the immigration authorities to abuse their statutory privilege to parole aliens into this country by keeping them out of reach of accused persons, the custom should be denounced as it completely deprives an accused of his inherent right to talk to witnesses and allows the immigration officers to prejudge the guilt of an accused. It is thought that the Judge's remark in placing his stamp of approval in this manner on this action was very prejudicial to the rights of the applicant and indicates that this court should exercise its supervisory control and grant this petition. The instability of these witnesses' and their amenability to persuasion is graphically demonstrated by the record. Besides recanting their testimony by their affidavits for Mr. Bennett, and the fact that they recanted their recant when called upon by the government to testify on the motion for new trial hearing, their testimony shows an utter state of confusion, viz:

> "Q. Mr. Apodaca, I believe you testified a while back that when the red horse fell, the man got off and hit

Mr. Bennett over the head and there was no more shots fired after the horse fell, is that correct?

"A. Yes, sir, that is true." (R. 689.)

The examiner then seeing the tremendous importance of this testimony, tried to pin the witness down so that escape would be impossible, and asked:

"Q. So it is your opinion that the shot that killed the horse was the last shot fired?"

The witness, seeing what he had done, stammered:

"A. No, the one that killed the horse was the first one."

Ascencion Mora was equally confused and testified that "after the man got off the red horse, he didn't hear any more shooting" was true (R. 735).

III.—(Restated)

The Circuit Court erred in not reversing the case because of the arguments of the prosecuting attorneys.

The arguments of each of the three prosecutors so abound in prejudicial and unwarranted comment, that excerpts from them are quoted herein as Appendix E. It is thought that a reading of these excerpts will convince this Honorable Court that the Circuit Court abused its discretion in holding that these argument were "little more than resorting to rhetoric" and that they might not have prejudiced the jury. In our opinion, the arguments are shocking and prejudicial in at least nine respects:

1. The United States Attorney, as well as each of his two assistants improperly expressed to the jury his personal belief in the guilt of the defendant on the basis of matters not in evidence and outside of the record.

2. The prosecutors improperly linked themselves, the Judge and the Jury as interested on the same side of the case; and particularly improperly argued that the Jurors had a duty to convict in order to show that they were on the side of law enforcement with the Federal officers.

3. The prosecutors improperly personally vouched for the Federal officers, their testimony and their integrity from personal knowledge, and personally guaranteed on their "solemn word of honor" that no promises had been made to any witness by the United States Attorney's office or any office represented by the Department of Justice.

4. The prosecutors improperly argued from personal knowledge as to the practice of detaining alien witnesses in this Country, which argument was aided by the comments of the Trial Judge in such connection, which said practice was thus established by unsworn testimony without the rights of cross examination by the Defendant.

5. The prosecutors improperly argued in substance that the real issue for the jury to decide was the vindication of the Federal officers instead of the guilt or innocence of the defendant, and that the jurors were not red-blooded Americans if they did not favor the law enforcement officers and find the defendant guilty because: (a) the officers constituted only a small group on the border and had an immense

job to do in all kinds of weather, (b) the officers protected the Country from Communism and everything detrimental coming in from a foreign country, (c) we, including the jurors, would not have the freedoms, benefits and beauties of our Country without the law enforcement agencies, (d) in recent wars, F.B.I. agents uncovered espionage, the underground and subversive elements, (e) the kind of officers described by the prosecutor were entitled to the support of the citizenship of the country they protect (meaning a verdict of guilty in this case), (f) each individual has to work for law enforcement, (g) if jurors allow law enforcement to break down, homes, property and rights will be jeopardized, (h) F.B.I. agents had a duty to investigate this case just as they did the Lindbergh kidnapping case and the Alger Hiss case, which would have not been broken without them, (i) the officers were entitled to a conviction, (j) if the jurors acquitted the defendant, they would be giving a license to assault Federal Officers, (k) the "little officers" had families and had a right to make a living, (l) criminals and Cubans come in from Mexico and the officers have to get down on their bellies waiting for them to come over, (m) the officers would be embarrassed in their future work and conduct if the Defendant should be acquitted, and (n) the verdict of the Jury must enforce the law.

6. The prosecutors improperly related the defendant and the alleged offense herein to the reprehensible matters mentioned in Paragraph 5, immediately hereinabove, particularly, Communism, espionage, war, the underground, crim-

inals and Cubans coming in from Mexico and the Lindbergh and Alger Hiss cases.

7. The prosecutors improperly argued concerning the effect of an acquittal of the defendant, particularly with reference to future conduct of the defendant, the officers and their supposed hardships and feelings.

8. The prosecutors improperly argued that the defendant should be convicted because he had worked "wetbacks" and such practice allowed the commission of thousands of offenses in the country.

9. The prosecutors improperly compared the defendant, as a little man, to Napoleon.

Innumerable cases have been reversed by the Appellate courts for violations of any one of these violations. The cumulative effect of them, together with the Judge's approval of them when objections were made (R. 480, 496) seems so shocking as to indicate that this court should grant this writ.

It is thought that the circuit court erred in two respects in not reversing the case on account of these arguments:

1. By finding that the arguments of the prosecuting attorneys and their utterances here complained of, were not of such nature that "they might have prejudiced the jury against appellant". We believe this holding is entirely unjustified by the record as shown by the decisions below, and hundreds of others and is such an abuse of discretion that this Honorable Court should grant this writ.

2. The circuit court did not apply the proper test for determining error herein. It will be noted that at the top of page 6 of the certified opinion, Appendix D, the Court said:

> "Of course, in a case in which the facts are so in dispute but in which each version of the story is believable, the jury might properly have determined either version to be true."

The Court thereby recognized there was a closely drawn fact issue. Yet in holding that the arguments were not prejudicial, the court said:

> "The evidence, standing alone, was amply sufficient for the jury to render a verdict of guilty against appellant * * *."

[For proof that the question of who shot first—the crux of the case was convincingly established in petitioner's favor, note the testimony of Dr. Stover to the effect that the injuries to Mr. Bennett's right hand were in his opinion, caused by the shattered steering wheel and fragments of the shattered bullet while he was sitting in his car (R. 215)].

The test, as laid down by this Honorable Court, is found in *Krulewitch v. United States, 336 U. S. 440, 93 L. Ed. 790 at 795, 69 S. Ct. 716*, as follows:

> "In Kottakos v. United States, 328 U. S. 750, 90 L. Ed. 1557, 66 S. Ct. 1239, it said that error should not be held harmless under the harmless error statute if upon consideration of the record, the court is left in grave doubt as to whether the error had substantive influence in bringing about a verdict."

The same test is applied to arguments in an often cited case, *Berger v. United States, 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314,* wherein this Honorable Court reversed a case for infractions thought not to be nearly so grave as the ones herein. It gives an excellent dissertation on the duty of the prosecuting attorney and the weight that the jury is apt to give to his remarks. Where the infractions are repeated, it says:

> "With a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded."

In *Lawn v. United States, 355 U. S. 339, 2 L. Ed. 2d 321, 78 S. Ct. 311,* headnotes 13 and 14, this Honorable Court in discussing the sole remark "we vouch for (Roth and Lubin) because we think they are telling the truth" felt that the case should not be reversed because the remark was made only one time and because "the government's attorney did not say, nor insinuate that the statement was based on personal knowledge or on anything other than the testimony of these witnesses given before the jury, *and therefore it was not improper * * *." The errors herein were repeated over and over and objections to them overruled by the Court.* (Emphasis supplied.)

See also *Viereck v. United States, 318 U. S. 236, 63 S. Ct. 561, 87 L. Ed. 734; Cf. Quercia v. United States, 289 U. S. 466, 53 S. Ct. 698, 77 L. Ed. 1321.*

There are innumerable circuit court opinion contrary to the instant one. One to which we especially invite your attention is *Greenberg v. United States (1 C.A. July, 1960).*

280 Fed. 2d 472. This case is of particular importance because of its reference to Rule 15 of the Canons of Professional Ethics of the American Bar Association. It holds that this Canon denounces any attorney expressing his personal views and says: "We believe the Canon to be elemental and fundamental." It will be noted that the U. S. attorney in the instant case said over and over again that he vouched for the credibility of the witnesses "because I know * * *" thereby telling the jury that he had more information than had been given to them by the witnesses.

See also *Steele v. United States, 222 Fed. 2d 628 (5 C.A.).* For a holding that the court's rulings concerning objections to these arguments were insufficient and prejudicial see *Handford v. United States, 249 Fed. 2d 295 at 299 (5 C.A.).*

As for the comments concerning what appellant might do if he was not convicted see *United States v. Sprengel, 103 Fed. 2d 876 (C.A. 3)*, wherein it is said:

> "Remarks of this tenor are intemperate, in character, and prejudicial in effect"

citing other cases.

We cannot conceive of more devastating arguments than these. They beg for conviction regardless of guilt or innocence and conclude with, "we ask that God give you strength to bring back a conviction on this man."

IV.—(Restated)

The Circuit Court erred in sanctioning the substitution of one judge for the purpose of passing on motion for new trial and sentencing when credibility of witnesses was involved.

It will be noted that when appellant, petitioner herein, discovered that Hon. Ben H. Rice, Jr., senior judge of the District, was coming to El Paso to pass on the motion for a new trial heretofore filed (R. 575) he immediately filed on March 29, 1960, a motion asking that Judge Rice postpone this hearing until Judge R. E. Thomason, who was only temporarily absent from the bench could hear same (R. 588). This motion concluded with the statement that Judge Rice was disqualified under the circumstances to serve and cited authorities.

The United States attorney then on March 31, 1960 filed an instrument entitled "motion" but which in effect is an answer which likewise shows that Judge Thomason was only temporarily incapacitated (R. 592). Judge Thomason then on April 1, 1960 (R. 595) filed an instrument permanently recusing himself. The appellant then on April 4, 1960 (R. 597) filed another motion which set out more in detail that Judge Rice was as a matter of law disqualified from passing on the motion for new trial and since Judge Thomason had voluntarily disqualified himself, that Judge Rice should, as a matter of law, grant defendant's motion for a new trial. We respectfully submit that Judge Thoma-

son asserts no legal justification for permanently recusing himself. In *48 C. J. S. 1080, Sec. 93*, there appears:

> "It is the duty of a judge, however, to exercise the judicial functions duly conferred on him by law and he has no right to disqualify himself in the absence of a valid reason, or when no party to the case could legally recuse him, and a general order of a judge to disqualify himself in the absence of anything tending to show legal disqualification, has been held void."

After Judge Thomason recused himself permanently, Judge Rice had no legal authority to do anything except grant a new trial. Judge Thomason recused himself only because the United States Attorney had put in his so-called motion that the alien wetback witnesses, of whose unreliability so much has been said, would testify that the appellant said he and Judge Thomason were good friends, etc. (R. 593). (No testimony on this had been heard at time of ~~rescuing~~ Recusing.) Whereas Judge Thomason said, in his order recusing himself, that this is not true (R. 596). The appellant joined Judge Thomason in this latter statement that he and appellant were not close friends, and stated that he did not desire Judge Thomason to ~~rescue~~ Recuse himself; but insisted that since he had tried the case, he and he alone pass on the motion for a new trial (R. 599-600) and sentence the defendant in the event that the motion was overruled. All motions were overruled.

There was absolutely no urgency that this motion be heard as the defendant, petitioner herein, was at large on

$10,000 bond and was a prominent ranchman and land owner in the District. This Honorable Court should take judicial knowledge of the fact that Judge Thomason was assuming some of the duties of his office before this motion was even passed on and was back on his bench in full capacity shortly thereafter.

We submit that for him to recuse himself under these circumstances and for Judge Rice or any other judge to overrule his motion for a new trial and sentence him, was not sanctioned by law. Since Judge Thomason had permanently disqualified himself, the Honorable Court should have granted a new trial.

The credibility of the two government witnesses who recanted and then recanted their recant, was the sole issue involved in the motion for a new trial and we therefore feel that when Judge Thomason recused himself, Judge Rice as a matter of law was required to grant a new trial. *Connelly v. United States, 249 Fed. 2d 576 (8 C.A. 1957), cer. den. 356 U. S. 921, 2 L. Ed. 2d 716, 78 S. Ct. 700,* is the case most thoroughly discussing this proposition. It was affirmed because credibility of the witnesses was not involved. See *Freeman v. United States (2 C.A.), 227 Fed 732.*

Moore Federal Practice, 2nd Edition, Volume 7-63.03, discusses this situation and in part says:

> "A successor judge is in no position to pass on the credibility of witnesses when he has not seen nor heard them testify"

citing cases.

28 U. S. C. 776, concerning signing of bills of exceptions by a successor Judge is the forerunner of both civil rule 63 and criminal rule 25. In discussing the similarity of these provisions, Mr. Moore in 63.03 (supra) says:

> "However, mere absence of the trial court from the district or circuit was held not to constitute a 'disability' authorizing the allowance for signing of a bill by a judge other than the trial judge."

The reason for the rule not allowing one judge to pass on a motion for new trial in a case that another has tried involving credibility of a witness, is the same as the rule not allowing an appellate court to substitute its judgment for the judgment of the trial judge in such a situation. This is graphically discussed in *United States v. Johnson, 327 U. S. 106, 90 L. Ed. 562, 66 S. Ct. 464.*

CONCLUSION

For the foregoing reasons and each of them, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HOLVEY WILLIAMS,
DANIEL Y. GARBERN,
405 Caples Building,
El Paso, Texas,

By Daniel Y. Garbern
Attorneys for Petitioner.

CERTIFICATE

I, DANIEL Y. GARBERN, one of the attorneys for petitioner, Lyman Moody Bennett, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16 day of March, 1961, I served a copy of the foregoing petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, on the following parties: On the United States by leaving a copy thereof at the office of Lawrence Fuller, Assistant U. S. Attorney for the Western District of Texas, El Paso Division, at his office in the United States Courthouse, El Paso, Texas, and by mailing a copy in a duly addressed envelope, with Air Mail postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C.

Daniel Y. Garbern

DANIEL Y. GARBERN

APPENDIX A

JUDGMENT

Extract from the Minutes of December 28, 1960.

No. 18385

LYMAN MOODY BENNETT,
versus
UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

APPENDIX B

ORDER DENYING REHEARING

Extract from the Minutes of February 17, 1961.

No. 18385

LYMAN MOODY BENNETT,

versus

UNITED STATES OF AMERICA.

It is ordered that the petition for rehearing filed in the above styled and numbered case be, and the same is, hereby DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 18385

LYMAN MOODY BENNETT,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty days from February 17, 1961; the stay to continue in force until the final disposition of the case by the Supreme Court; provided that within thirty days from February 17, 1961 there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon

the expiration of thirty days from February 17, 1961 unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ ELBERT P. TUTTLE
United States Circuit Judge.

(ORIGINAL FILED—February 25, 1961.)

Dated:

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18385

LYMAN MOODY BENNETT,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Western District of Texas.

(December 28, 1960.)

Before TUTTLE, Chief Judge, and JONES and BROWN, Circuit Judges.

TUTTLE, Chief Judge: Appellant was convicted by a jury on each of two counts of an indictment charging:

That on or about November 13, 1959, in Hudspeth County, Texas, within the El Paso Division of the Western District of Texas, LYMAN MOODY BEN-

NETT, by pointing and firing same, used a deadly and dangerous weapon, to wit, a .300 Savage Ri[f]le to forcibly assault, resist, oppose, impeded [sic] intimidate, and interfere with United States Border Patrol Inspector Thurston C. McCutchen, a person designated in Section 1114 of Title 18, United States Code, while the said Thurston C. McCutchen was engaged in and on account of the performance of his official duties.

SECOND COUNT.

That on or about November 13, 1959, in Hudspeth County, Texas, within the El Paso Division of the Western District of Texas, LYMAN MOODY BENNETT, by pointing same, used a deadly and dangerous weapon, to wit, a .300 Savage Rifle, to forcibly assault, resist, oppose, impede, intimidate, and interfere with United States Border Patrol Inspector Carey C. Whitman, a person designated in Section 1114 of Title 18, United States Code, while the said Carey C. Whitman was engaged in and on account of the performance of his official duties. (Record, pp. 1-2.)

The essential words of the indictment are substantially those of 18 U.S.C.A. § 111[1] and it was under this provision that appellant was convicted and sentenced to 18 months on

[1]Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

the first count and two years on the second, the second sentence to commence at the expiration of the first but being suspended for three years during which time appellant was to be placed on probation without supervision.

Appellant was at the time of the event on which his conviction was based the owner of a 70,000-acre ranch located entirely within the United States but situated on the Mexican border. A portion of that property within a very short distance of the border was used for the production of cotton, and it is uncontroverted that a number of "wetbacks", citizens of Mexico illegally within the territorial limits of the United States, were employed to pick the cotton. On the date in question several officers of the United States Border Patrol entered appellant's property for the purpose of searching for persons illegally within this country.[2] It appears that officers of the Border Patrol often made visits to appellant's ranch for this purpose and that they and appellant were on friendly terms.

It also appears that appellant had knowledge of the presence of at least one officer of the Border Patrol on November 13, 1959. That officer was driving a pickup truck, to which was attached an empty horse trailer, on a private road on appellant's ranch, when he was overtaken by appellant and stopped and asked the reason for his

[2] 8 U. S. C. A. § 1357 provides: "(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant— * * * (3) * * * within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States * * *." No question touching on the constitutionality of this statute is before this Court.

presence. Appellant ascertained that the trailer was empty. He then drove off in the direction of the cotton fields, and was closely followed by the officer in the truck. The officer testified that appellant fired one shot into the air from his rifle; appellant claimed that he did not.

Meanwhile, officers McCutchen and Bennett, on horseback, approached the cotton fields and captured two citizens of Mexico who attempted to run to the nearby river, then so shallow that it could be crossed on foot, presumably to return to the safety of their homeland. They brought these persons back to a road near the cotton fields; at about that time appellant arrived in his automobile, still followed by the truck. What next happened is in dispute, but the jury was authorized to believe the version told by the officers and several Mexican workers who were employed in the immediate vicinity.

According to Officer McCutchen, appellant drove up, got out of his car with his rifle in his hand, took several steps toward him, and pointed the rifle in his direction. "I hollered, 'Put that gun down', but before that he had said, 'Get those sons of bitches out of here or I am going to kill the whole goddam works'." McCutchen drew his pistol, and then appellant shot and killed McCutchen's horse. "Then I came off my horse, I hit the ground about the same time my horse did, and fired twice at Moody. * * * I closed in on him by that time, as he turned his gun towards Whitman, and I hit him up on the side of the head with the pistol to keep from having to kill him." Apellant was struck on the head at least two times and was disarmed.

Appellant's story is materially different. He says he drove up to the cotton field, saw two men whom he took to be cowboys from the manner in which they were dressed, and shouted for them to get their horses out of the field. The men then crowded close to his automobile, abused him in opprobrious language, and fired two shots into the automobile, the first hitting the steering wheel and breaking into fragments which injured appellant's hand and the second passing through his arm and into the front seat. The shooting, says appellant, frightened the horses and he sought to take advantage of the situation by attempting to "booger", or scare them further, to which end he left his automobile and attempted to place himself between the two horsemen to prevent them from shooting at him. He claims that they fired additional shots at him and that it appeared that one of the horses might topple on him, at which point he shot the horse; it was only after this, says he, that he first recognized the rider of the dead horse as Officer McCutchen; he then dropped his rifle. He claims that McCutchen attempted to shoot him after this and did beat him with his pistol, McCutchen being stopped only by the intervention of Officer Whitman.

Of course, in a case in which the facts are so in dispute but in which each version of the story is believeable, the jury might properly have determined either version to be true. The resolution of factual issues is the peculiar province of the jury, and an appellate court will not disturb their findings unless they appear to be without substantial evidence to support them. That is not the case here.

nor does appellant attempt to argue that the verdict returned by the jury is against the weight of the evidence. Rather, his theory which, he argues, will justify a reversal for a new trial is based on other grounds.

The most substantial points raised by appellant in this appeal go to the sufficiency of the indictment. He contends that the indictment should have been quashed because it erronously was based on the theory that a Border Patrol Inspector is a "prson designated in Section 1114 of Title 18, United States Code"; that the indictment was insufficient in law in that it failed to allege that appellant "knowingly" assaulted an officer or that he feloniously or illegally did the act, appellant claiming that knowledge of the official character of the person assaulted is necessary to constitute the crime of which he was charged; that the indictment was duplicitous in that it charged more than one offense in each single count.

We find these objections to be without merit. Going to the first point, it seems abundantly clear that the provisions of § 111, taken in conjunction with those of § 1114, are sufficiently broad to include officers of the Border Patrol within that class of governmental personnel sought to be protected thereby. Section 1114 refers to "any immigration officer", and the mere fact that officers McCutchen and Whitman were engaged in duties relating to immigation should be enough to bring them within the protection of the acts. We hold that they were and are such immigation officers as contemplated by the act. It is unim-

portant that § 1114 does not include the words, "Border Patrol".

Neither are we persuaded by appellants' argument that the indictment was insufficient because it failed to include the element of scienter. The statute making criminal such acts as those of which he was convicted does not require that the doer of the act have knowledge that the person who is assaulted, resisted, opposed, impeded, intimidated, or interfered with is a federal officer. It merely requires that the act condemned be done in order to establish a violation of the statute, and the provisions of the section apply to "whover" does the act, whether he does it with knowledge of the character of the person whom he acts against and whatever his intent in so acting. The following language in *McNabb v. United States* 123 F. 2d 848, cert. den. 316 U.S. 658, rev. on other grounds 318 U.S. 332, rehearing den. 319 U.S. 784, though directly applicable to the present § 1114 alone, is pertinent here:

> Appellant complains further that, at their request, the District Court should have charged the jury that the defendants could not be convicted unless they knew or had reasonable grounds to believe that the murdered man was a government officer. They charge error also in the refusal of the court to direct a verdict of acquittal for the reason that the appellants "did not have notice or knowledge that the deceased was an officer connected with the Internal Revenue Department of the United States of America at the time the fatal shot was fired."

Refutation of this specious argument is found in the plain language of the statute: "Whoever shall kill, as defined in section 452 and 453 of this title any United States Marshall * * * any officer, employee, agent, or other person in the service of the customs or of the internal revenue * * * while engaged in the performance of his official duties, or on account of the performance of his official duties, * * * shall be punished as provided under section 454 of this title".

* * * * * *

To be amenable to punishment under this section of the Criminal Code of the United States, the killer need not know that he is killing an officer, agent or employee of the United States. The ingredient of the crime condemned is the unlawful killing of a human being in some manner defined in section 452 and 453.

Jurisdiction in the federal courts under Section 253 stems from the actuality that the person killed is a designated federal officer, engaged in the performance of his official duties. In the language of the statute quoted in excerpt, no exemption is expressly made of a killer who does not know that he is killing a federal officer of a class covered by the statute. Exemption may not be implied. The words and the intent of the statute are clear beyond the necessity for any canonical construction. The statute says, "whoever shall kill," not "whoever shall kill with knowledge that he

is killing" a federal officer of an enumerated class, shall be punished. 123 F. 2d 848, at 854-855, footnotes omitted.

In this case, the circumstances are even more strongly posed against appellant's argument than they were against that of the defendants in the McNabb Case, *supra*, for here the trial judge instructed the jury that, to find the appellant guilty of the crimes with which he was charged, they must find that he knew that the officers he was assaulting were federal officers, and, presumably, the jury so found. They thus rejected appellant's argument that, because of their not being in uniform, he mistakenly thought that Officers McCutchen and Whitmore were mere cowboys trespassing on his land, against whom he was attempting to protect his property and his person. The statute does not provide any of these exemptions for appellant, and, though the trial judge went farther than was necessary in requiring knowledge on the part of the appellant, the indictment was itself sufficient in law and by his argument appellant does not make out a cause for reversal.

Nor do we find that appellant's argument as to duplicity is worthy of extensive consideration. Even assuming that this issue was raised in a timely manner, which appellee denies, the indictment followed the language of the statute under which it was brought, and this was sufficient to give appellant notice of the crime of which he was charged, the indictment being "sufficient to prove any one or more of the charges". *United States v. Segelman*, 86 F.Supp. 114, at

120, aff'd. 212 F.2d 88. See, e.g., on the issue of timeliness, *Durland v. United States*, 161 U.S. 306.

Turning to the other points raised before this Court by appellant, we agree with the government that the trial judge did not commit reversible error in commenting to the jury as to the manner and custom of sentencing aliens for illegal entry into the United States, or in commenting as to the propriety of the government's custom of holding aliens in this country until such time as they are used as witnesses. Nor were the arguments of the prosecuting attorneys and their several utterances here complained of so inflammatory that they might have prejudiced the jury against appellant. Upon the record as a whole, it appears that the attorneys for the government were doing little more than resorting to rhetoric in presenting their case to the jury, and it must be remembered that they, too, are advocates. *DiCarlo v. United States*, 6 F.2d 364, at 368. The evidence, standing alone, was amply sufficient for the jury to return a verdict of guilty against appellant. this is not a case in which a small amount of evidence to support the government's case is so enlarged by advocacy as to make it appear that the government had made out a very strong case against the defendant. See *Nalls v. United States*, 240 F.2d 707.

Finally, appellant urges upon this Court the argument that error was committed in that Judge Rice, who sentenced him after Judge Thomason, who had conducted the

trial and who had thereafter recused himself from further proceedings in this matter, refused to disqualify himself from sentencing appellant and refused his motion for a new trial. We think that the district judges herein involved acted properly within the context of Rule 25 of the Federal Rules of Criminal Procedure. Judge Thomason's power to disqualify himself was a matter of his own discretion, and it does not appear that he abused that discretion in so acting after a verdict had been brought in. In the first place, he had been stricken with penumonia, and, while his disability was not a permanent one, it seemed in doubt when he would be able to return to the bench and to dispose finally of this case. Secondly, he appears to have had knowledge of the fact that appellant was using his name in order to obtain affidavits from certain witnesses in order to support his motion for a new trial. Further, the Record indicates that Judge Rice thoroughly familiarized himself with the case before proceeding to the matter of sentencing. From this it should be abundantly clear that in so acting the judges not only attempted to dispose of this matter as speedily as justice to the parties would allow but that in so doing they sought to protect the rights of the defendant-appellant. There is no error which would justify a reversal on this ground.

For the reasons set out above, the judgment of the District Court is

AFFIRMED.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By CLARA R. JAMES
Deputy

New Orleans, Louisiana
Feb. 28, 1961.

APPENDIX E

OPENING ARGUMENT OF HONORABLE RUSSELL WINE, UNITED STATES ATTORNEY

(Record Pages 479-497)

(Emphasis supplied)

MR. WINE: If the Court please, Ladies and Gentlemen of the Jury: At the outset, I want to say that the Court and all of the officials of the Court thank you for the time and considerate and studied attention that you have given during the presentation of the evidence of this case. *It is an important case because it looks like law enforcement is on trial.* It is a case that I am confident that my two assistants here in El Paso, Mr. Hammond and Mr. Fuller, were perfectly capable of handling alone, but when the insinuations and talk get around that there is a kind of a frame-up between the (480) different agencies of the Department of Justice to thwart the enforcement of the law, or to hinder it, *I think it is time for every red-blooded American to stand up and assert his right in favor of law enforcement*, and more especially the United States Attorney, who is in this District, in this particular part of the country the head of our law enforcement, *I say, situated as we are here along the Border, that law enforcement is on trial*, that you have the long span of Mexican Border, long span of country there, that you will notice from the evidence that has been presented here, just a small portion of it, the condition of the terrain along that border, so you can imagine with the *small force of Border Patrolmen or F.B.I. or Custom Agents what an im-*

mense job those people have out there in all kinds of weather and under all conditions to try to secure this country against influx of Communism, the influx of everything that can come in from a foreign country that is detrimental • • •

MR. LUSCOMBE: We object to the reference to Communism, there is nothing in this record as to that, it is prejudicial.

THE COURT: Well, both sides will be given wide latitude about the duties and work of the Immigration Service.

MR. WINE: The officers along this Border protect this country, protect you and I. We have presented here for your consideration about five Border Patrol Officers, two State Rangers, and a Sheriff, *and I vouch for everyone of* (481) *those officers* because you can see from their demeanor on the stand, and from their attitude, and the way they conducted themselves, that they were trying to give you a complete and true picture of what happened in this case. *I strictly vouch for them because I know they wouldn't be in those positions if they hadn't been tried and tested and gone through the proper schooling to be there.* Where would we be in this country, with this Government that we have that we all love so well, with all the freedoms and all the benefits and the beauties that we have in this country, were it not f.. *the protection that has been given us by those law enforcement agencies.* Take our *recent wars*, I know you have all read the newspapers and know what was going on, if it hadn't been for our F.B.I. Agents who would have discovered *espionage*, who would have discovered all of the *underground*

and all of the *subversive elements?* I say that *that kind of an officer that takes his life in his hands every day of his life is entitled to consideration and support by the citizenship of any country that he is designated to protect. I vouch for everyone of those officers* and I say that I resent any insinuation and any statement that there is collusion on the part of the Border Patrol and the F.B.I. or any other agency to thwart any investigation, or that there is a collusion or combination to try and get a conviction of a man who may be innocent. *It is as much the duty of the District Attorney to see that the innocent are acquitted as it is to see that the guilty are convicted. That is my purpose and my duty and that* (482) *is what I expect to see and expect to do* as long as I am honored with this position, *but there are certain things that you can't condone.* We have a government of laws; our forefathers gave us a Constitution and Bill of Rights, and since that time the people have voted certain amendments to the Constitution, and we elect by our democratic system of government representatives to go to Congress to pass our laws, and *the Congress always has in mind the protection of individuals as well as the protection of the public*, and I believe that you will agree with me that the public at large is entitled to as much protection as any particular individual. Our Government is made up of individuals but *each individual has to work together for law enforcement or we don't have any enforcement* because it is a government of laws, and if law enforcement breaks down any place, then our government breaks down. There are no bigger laws nor no smaller laws, they are all exactly the same. The

penalty for different acts sometimes is more and sometimes is less, but as far as the law itself is concerned, and the enforcement of any law, each and every law—whether you consider it big or little law—is entitled to and should receive the same kind of enforcement because *when we start to break down in even the slightest degree in our law enforcement then the protection of our homes, the protection of our property, the protection of all of our rights breaks down* commensurate with the degree to which the (483) law enforcement breaks down, and *we, as citizens, everyone of us, whether it be the United States Attorney, or the Federal Judge, or juror*, or an attorney as an officer of this Court, it is our duty to see that as far as we can the true facts in any case of this sort are presented to you in order that you may, under the direction of this Court, *arrive at a just and equitable verdict in enforcing the law, because it is your duty*, when you are selected you are selected by an impartial jury commission, the Clerk and a jury commissioner, your names are put in a box, they are drawn out from the ordinary people of the ordinary walks of life, *you represent the thinking of this whole country through here, of the El Paso Division of the Western District of Texas*, and it is for that reason that our Congress and our forefathers saw fit to give us a Constitution and laws backing up that Constitution by which we select our jurors of reasonably prudent, ordinary business people who know the ordinary walks of life and the things that take place in a person's everyday living that will cause you to make a decision one way or another in the matter that is presented to you in open court. *I have taken an oath to do*

my duty, and I expect to do it. You have taken an oath to do your duty and I expect you to do it.

* * * * *

(490) * * * Now. Mr. Bennett furnished those witnesses for us. They all testified they made a deal with him to come on over and pick cotton, that *he knew they were "wets", he knew they were not entitled to be over here.* He had had braceros before, but he admitted he didn't have any then, which he had a right to do like any American (491) citizen, go to Mexico and get them over here. You can do that because then it can be supervised, *but if they come over here helter-skelter, with no supervision and no one to supervise it, why, the first thing you know they are off in the middle of the country and every place else committing thousands of other offenses that nobody in the world can ever control.*

* * * * *

(492) * * * What did these Mexican boys tell you? They were there handcuffed, both of them scared, both of them had already violated the law, had come over here as wetbacks and stood a chance of being put back, and if they had been put back right there we would have no evidence outside of the officers on one side and the defendant on the other, but through the wisdom of our law enforcement the Attorney General and the United States Attorneys are given authority and the Customs Agents are given authority to keep witnesses of that kind that might disappear and you'd never get them in this country, to give them protection until the trial comes up and then have them here so we

can use them as witnesses, *otherwise you'd have nobody to testify, no outsider, other than the two shooters — the shooter and the shootee—on each side.*

* * * * *

(495) * * * Now, the Government has brought you all of the evidence that they have here. The defendant contradicts every witness that took the sand, everybody is out of step but Jimmy, he gives you an entirely different story, he does that because he wants to interject into this case self-defense, and, according to him, everybody is lying or else not telling the truth. He says he didn't shoot his gun out there where Mr. Mahan was at all, didn't get his gun out. *Mr. Mahan says he did shoot, and I vouch for the integrity and truthfulness of these officers.* There was no frame-up between any officers. There has to be collaboration between the different agencies because this was a case in which the Border Patrol were specifically the witnesses, they had to report it to the F.B.I. because the F.B.I. is the investigative agency that investigates all offenses committed in the Department of Justice, they don't investigate the little trivial Immigration cases because they are routine and are handled by the local offices, but when a thing of this sort takes place, when an individual tries to interfere with the enforcement of your Immigration laws or enforcement of any other law, federal law, that is of the magnitude that this case is, *where the rights of individuals in this country are seriously hindered by the non-performance of their duties,* (496) *then it is the duty of the F.B.I. to make that investigation, and I say if we hadn't had of-*

ficers like that we never would have broken the Lindbergh case, you never would have gotten Alger Hiss, you never would have gotten * * *

MR. LUSCOMBE: We will object to the argument. This is not a kidnapping case and this is not * * *

THE COURT: Well, certainly I hope everybody understands that, and the jury is instructed that, as the Court understands it, he was commenting on the work of the F.B.I. For the Gentlemen's information, he has spoken thirty-three minutes.

MR. WINE: I am sorry I took so long.

THE COURT: You do as you like, I just want to tell you the time.

* * * * *

(497) * * * I say that the Government has overcome everyone of those obstacles and has proven to the satisfaction of any reasonably-minded jury beyond any reasonable doubt whatsoever—as the Court will charge you in his charge—that the offense has been committed, *that both of these officers were impeded in the discharge of their duties down there that day, and as officers protecting our homes, they are entitled to a judgment of conviction. I thank you.*

OPENING ARGUMENT OF HONORABLE JAMES E. HAMMOND, ASSISTANT UNITED STATES ATTORNEY

(Record Pages 497-501)

(497) * * * I would like to say at the outset that Mr. Wine has suggested, and perhaps rightly so, that the Department of Justice (498), of which I am a member, the Federal Bureau of Investigation, which is a branch of the Department of Justice, the Immigration and Naturalization Service, and the Border Patrol, are being subjected to great criticism, by inuendo, if not by direct attack, we have been said to fabricate stories, to suborn prejury, and to manufacture evidence, by counsel for the defendant, we have been said to promise the aliens this and that. We asked the aliens, "What is going to happen to you after the trial?" They said "Well, I guess I will go back to Mexico, or I won't if you don't let me go back." And then counsel attempted to get from Juana Perez—and I am sure you caught it— that we promised her that she could come over here to the United States. *I guarantee you on my solemn word of honor that no promises were made to any witness that took that witness stand by my office or by any office that it represented by the Department of Justice.*

* * * * *

(501) * * * Before you retire and before you go to consider this case, *I want you to look back there, seated in a row, at the uniformed officers who are going to have to go down on his farm and others on the border, and if you want to give a license to assault federal officers then you turn Lyman Moody Bennett free.*

CLOSING ARGUMENT FOR THE GOVERNMENT BY HONORABLE LAWRENCE F. FULLER, ASSISTANT UNITED STATES ATTORNEY

(Record Pages 529-547)

(529) * * * I feel sorry for anybody, even any of you, that would think that somebody like Hammond and myself are going to stand up here and present a case to you all on the basis (530) of star witnesses, bribes, promises, that we are going to live in this community tomorrow and stand up here and give you a case built on fraud. When we took the case we knew that when we had a man like Moody Bennett, he is a big man, seventy thousand acres, we knew at the time we took it that he was going to be represented by able counsel. Mr. Runge and his son from San Angelo, Mr. Luscombe of the firm of Fryer, Milstead & Luscombe, we knew that. We have our duty to do. We take an oath when we take this job to try those people who are guilty and we also take an oath that we are to let free those who we think are innocent, our duty runs both ways, we have a duty to prosecute those that are guilty and we have a duty to not file on those that we think are innocent.

* * * * *

(530) * * * Hammond and I don't think this case is funny, it is serious, *we want to get a conviction*, we are not representing anything else, *we want Moody Bennett convicted.*

* * * * *

(542) * * * Now, I cannot talk about democracy, and the flag (543) and all of this, but it just seems to me that you cannot have all of what Mr. Luscombe says without one

law enforcement, that vice-versa, it is men like this that make democracy impossible, that these little officers, they have families too, they have a right to make a living, they have a right to go about their work with safety, that indirectly we get our democracy from them.

* * * * *

(543) * * * Now, I am sure you also realize that just as sometimes you get United States criminals going to Mexico, vice-versa *we have criminals that come in from Mexico, we have Cubans that come in through Mexico.* Conceivably, since it is against the law to come in here, they come in at night, they don't come in during the daytime, therefore *you can see that the Border Patrol has to be down there at night, they have to be down on their bellies waiting for them to come over.* I don't know how you feel about this. I have looked at these men for four days, I never knew them before, but I dread seeing them go back to Marfa if you acquit this defendant. Hammond and I feel our duty here, we really do, we have a statute for their protection, a case is filed, and *it is up to us to prosecute it for their protection.* We feel we had a duty, a duty that we have performed to the best of our ability. If we have been offensive to any of you, we (544) apologize, and we in turn hope that you did not come into this case with prejudice, that *when you analyze this case that you will give these men—these men that Mr. Luscombe refers to as the first platoon down there—that you give them the fair treatment that you are going to give the defendant.*

* * * * *

(545) * * * Ladies and Gentlemen, we got a man here, *remembering that Napoleon was a little man, this is a little man.* Put a rifle like that in his hand, he is a big man, he is a big farmer, you let this man loose today, these officers have to be down there tomorrow in Marfa, working these areas. You disregard this evidence that is before you, *you disregard that sworn testimony of those officers, and we might as well forget about putting on criminal cases because our criminal cases are built around officers. You acquit this little man and this little man will be down in Marfa tomorrow telling everybody why,* he appeared before the Grand Jury, the officers have assaulted him, he is going to pursue a state charge, and that is something I did not want to forget.

* * * * *

(547) * * * *Now, in closing, we ask you this, do not send these men back to Marfa tomorrow without finding this defendant guilty,* there is evidence to convict this defendant, and if you will be as fair with the Government as you are with the defendant, you will find that evidence, and *we ask that God give you the strength to bring back a conviction on this man. Thank you.*